

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

KATHLEEN P. MULLINIX,

Plaintiff,

V.

KIKI BOGORAD-GROSS and LEONARD P.
BOGORAD, As They Are Executors of the Will of
Lawrence Bogorad,

Defendants.

Civil Action No. 04-12684-WGY

**PLAINTIFF'S OPPOSITION TO
DEFENDANTS' MOTION FOR RECONSIDERATION**

Plaintiff Kathleen P. Mullinix (“Mullinix” or the “Plaintiff”), by and through her counsel, hereby submits this opposition to Defendants’ Motion For Reconsideration (“Defendants’ Motion”). Defendants’ Motion should be denied for the reasons set forth below.

1. As described in Plaintiff's Motion to Strike Defendants' Designation of Expert Witness, filed with this Court on April 12, 2006, the designation of Christopher Devine as an expert was made beyond the deadline established by Fed. R. Civ. P. 26(a)(2) and Local Rule 16(b). Defendants ignored the deadline established by the Court to designate experts, and then, more than two months later on the last date set by the Court for deposing experts, purported to designate an expert, causing prejudice to Plaintiff.
2. Defendants have failed to meet the standard articulated by the Court's Order of May 3, 2006 (the "Order"). In its Order, this Court required Defendants to support their Motion of Reconsideration with "an Expert Report Setting Forth The Proposed Experts' Opinions

and The Basis Therefore to the Level of Exquisite Detail of a Patent Claim....”

Defendants have failed to meet this burden. They fail to offer even a simple explanation of how Mr. Devine’s report satisfies this Court’s stringent requirement.

3. In addition, Defendants have failed to articulate how Mr. Devine’s opinions, or his report, are relevant to the Plaintiff’s claims in this case. This case concerns Mr. Bogorad’s commitments, prior to December 28, 2003, to pay for certain costs related to Ms. Mullinix’s purchase of a co-operative apartment. Defendants have offered no explanation concerning how the current value of the co-operative apartment is relevant to the issues before this Court.
4. Finally, two aspects of Mr. Devine’s report and supporting documents that were submitted to this Court are illustrative of the Defendants’ pattern of being less than forthright in terms of producing information required under the Federal Rules of Civil Procedure. First, on April 7, 2006 Defendants’ counsel wrote to Plaintiff’s counsel that “Due to confidentiality agreements, Mr. Devine cannot disclose a list of the cases in which he has testified over the past four years. I am informed that he has testified as an expert ‘a dozen’ times.” *See* Letter from Lisa M. Hodes to Michelle L. Dineen Jerrett, dated April 7, 2006 (attached hereto as *Exhibit 1*). Despite this purported inability to provide this information, however, the Defendants provided precisely that same information – voluntarily – to the Court. Second, and perhaps even more disturbing, the Defendants failed to provide Mr. Devine’s compensation information to Plaintiff’s counsel when they provided a copy of Mr. Devine’s so-called expert report and attempted to designate him as their expert on April 7, 2006.¹ Interestingly, the copy of Mr.

¹ On March 30, 2006, Defendants’ counsel informed Plaintiffs that Mr. Devine would be produced for a deposition “if and when we do designate him . . . on the condition that you compensate him for his time . . . I have asked [Mr.

Devine's invoice included with the so-called expert report contained *no* information regarding his standard rates for depositions or testimony. *See* Invoice of Mitchell, Maxwell & Jackson, received by Plaintiff's Counsel on April, 7, 2006 (attached hereto as *Exhibit 3*). However, the copy of the same invoice – dated January 23, 2006 and filed with this Court along with the Motion – includes a detailed description of Mr. Devine's rates. *See* Invoice of Mitchell, Maxwell & Jackson in Defendant's Motion, dated May 10, 2006 (attached hereto as *Exhibit 4*). Therefore, it is evident that the Defendants were aware of Mr. Devine's rates for depositions at least two months prior to Ms. Hodes' March 30, 2006 email disavowing such knowledge, and yet failed to provide this information to Plaintiff despite being required to provide such information pursuant to Fed. R. Civ. P. 26(2)(B).

WHEREFORE, Plaintiff respectfully requests that this Court deny Defendants' Motion For Reconsideration.

Respectfully submitted,

KATHLEEN P. MULLINIX,
By her attorneys,

/s/ Michelle L. Dineen Jerrett
Larry C. Kenna (BBO # 267760)
Michelle L. Dineen Jerrett (BBO #634930)
Sara E. Solfanelli (BBO #658018)
CHOATE, HALL & STEWART
Two International Place
Boston, Massachusetts 02110
Tel: (617) 248-5000

Date: May 16, 2006

Devine] to forward me his standard schedule of fees for depositions." *See* Email from Lisa M. Hodes to Sara E. Solfanelli, dated March 30, 2006 (attached hereto as *Exhibit 2*).

CERTIFICATE OF SERVICE

I hereby certify that on May 16, 2006, a copy of Plaintiff's Opposition to Defendants' Motion For Reconsideration was served by email and first-class mail upon the attorney of record for the defendants.

/s/ Michelle L. Dineen Jerrett

EXHIBIT 1

**SULLIVAN &
WORCESTER**

Sullivan & Worcester LLP
One Post Office Square
Boston, MA 02109

T 617 338 2800
F 617 338 2880
www.sandw.com

April 7, 2006

BY HAND

Michelle L. Dineen Jerrett, Esq.
Choate Hall & Stewart LLP
Two International Place
Boston, MA 02110

Re: Mullinix v. Bogorad-Gross, et al.

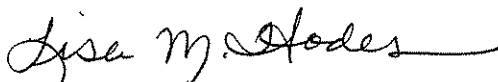
Dear Michelle:

Pursuant to Fed. R. Civ. P. 26, we are designating Christopher Devine from the real estate appraisal firm Mitchell, Maxwell & Jackson, Inc. as an expert witness to testify regarding the current fair market value of the Plaintiff's cooperative apartment located at 1050 Fifth Avenue, Apartment 15B, in New York, NY. Enclosed are the documents required by Fed. R. Civ. P. 26(a)(2). Mr. Devine has not been published. Due to confidentiality agreements, Mr. Devine cannot disclose a list of the cases in which he has testified over the past four years. I am informed he has testified as an expert witness "a dozen" times.

Also enclosed is Defendant Kiki Bogorad-Gross' Supplemental Answers to Plaintiff's First Set of Interrogatories. Defendant Leonard Bogorad's Supplemental Answers to Plaintiff's First Set of Interrogatories will be sent under separate cover.

Please do not hesitate to contact me if you have comments or questions.

Very truly yours,



Lisa M. Hodes

Direct line: 617 338 2426
lhodes@sandw.com

cc: Larry L. Varn, Esq. (w/o attachments)

EXHIBIT 2

From: Solfanelli, Sara E.
Sent: Thursday, March 30, 2006 3:36 PM
To: Golding, Heather A.
Subject: FW: Expert Witness

-----Original Message-----

From: Hodes, Lisa M. [mailto:lhodes@sandw.com]
Sent: Thursday, March 30, 2006 3:13 PM
To: Solfanelli, Sara E.
Cc: Dineen Jerrett, Michelle L.; Varn, Larry
Subject: RE: Expert Witness

Sara:

As you know, we have not yet designated Chris Devine as our expert witness. However, following the receipt of his report, if and when we do designate him, he and we are available April 13 at 11 a.m. We can make him available at 11:00 a.m. in a conference room at our New York City office at 1290 Avenue of the Americas on the condition that you are to compensate him for his time. I have asked him to forward me his standard schedule of fees for depositions.

We will accept service for him.

Please let me know if you have comments or questions.

Thanks,
Lisa

-----Original Message-----

From: Solfanelli, Sara E. [mailto:SSolfanelli@choate.com]
Sent: Thursday, March 30, 2006 11:12 AM
To: Hodes, Lisa M.
Cc: Dineen Jerrett, Michelle L.; Golding, Heather A.; Kenna, Larry
Subject: Expert Witness

Hi Lisa,

I am writing to inquire about the contact information for Christopher Devine of Mitchell, Maxwell & Jackson, your designated expert for the appraisal. There is no contact information provided in your clients' Supplemental Answers to Interrogatories. As you may expect, we plan on noticing a deposition of Mr. Devine. I have a few questions, which may make this process go a bit smoother. Will you agree to accept service of Mr. Devine's Notice of Deposition, or will you require that we serve him with a subpoena and the notice? Also, will you make him available to be deposed in Boston, or should we notice it for a location in New York? And, finally, we intend to notice Mr. Devine's deposition for April 7. Please let me know if that date will present a conflict because, as you know, it is the last day for expert depositions.

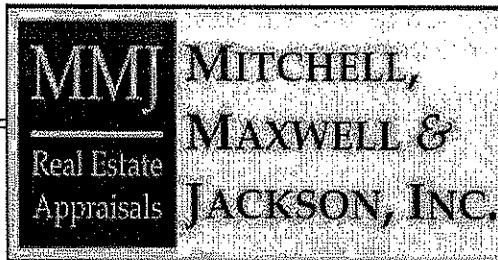
Please let me know your thoughts as soon as possible, as I would like to get the notice out today. Please feel free to call me directly with any questions or to discuss.

Thanks much,
Sara

Sara E. Solfanelli
Choate, Hall & Stewart LLP
Two International Place
Boston, MA 02110
t 617-248-5080
f 617-248-4000
ssolfanelli@choate.com

5/16/2006

EXHIBIT 3



MULLINX v. BOGORAD
File No. P601535

***** INVOICE *****

File Number: P601535

LISA HODES
SULLIVAN & WORCESTER LLP
ONE POST OFFICE SQUARE, ZONE 10
BOSTON, MA 02109

Borrower : N/A
Invoice # : P601535
Order Date : 01/23/2006
Reference/Case # : MULLINX v. BOGORAD-GROSS
PO Number :

1050 FIFTH AVENUE
NEW YORK, NY 10028

	\$	2,500.00
	\$	

Invoice Total	\$	2,500.00
State Sales Tax @	\$	0.00
Deposit	(\$)
Deposit	(\$)

Amount Due	\$	2,500.00

Terms:

Please Make Check Payable To:

Fed. I.D. #:

CONFIDENTIAL
DEVINE00018

EXHIBIT 4



MULLINX v. BOGORAD
File No. P601535

***** INVOICE *****

File Number: P601535

LISA HODES
SULLIVAN & WORCESTER LLP
ONE POST OFFICE SQUARE, ZONE 10
BOSTON, MA 02109

Borrower : N/A
Invoice # : P601535
Order Date : 01/23/2006
Reference/Case # : MULLINX v. BOGORAD-GROSS
PO Number :

1050 FIFTH AVENUE
NEW YORK, NY 10028

	\$	2,500.00
	\$	

Invoice Total	\$	2,500.00
State Sales Tax @	\$	0.00
Deposit	(\$)
Deposit	(\$)

Amount Due	\$	2,500.00

Terms:

Please Make Check Payable To:

Fed. I.D. #:

For depositions or testimony, Mr. Devine is available for half-day increments. A half day is 4 hours and costs \$1600. Any time needed from one block into the next will be billed as one half-day. A \$1600 retainer is due and payable 24 hours in advance of the deposition or testimony.

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